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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1060

H. WILLIAM KLARE, RECEIVER OF DETROIT BANKERS COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 53–55) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 56). The petition for a writ of certiorari was filed on February 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the receiver of a bank holding company has any standing to sue on behalf of that company in the Court of Claims to compel the United States to account for the expenses incurred by the Comptroller of the Treasury in connection with the receivership of an insolvent national bank where, prior to the commencement of the Court of Claims proceeding, the holding company had been divested of its entire ownership interest in the bank pursuant to a final order of a federal district court.

STATUTES INVOLVED

R. S. 5238, 12 U. S. C. 196, provides in pertinent part:

> * * * All expenses of any receivership [of any national banking association] shall be paid out of the assets of such association before distribution of the proceeds thereof.

The Act of June 30, 1876, c. 156, § 3, 19 Stat. 63, as amended, 12 U. S. C. 197, provides in pertinent part:

> Whenever any [national banking] association shall have been or shall be placed in the hands of a receiver, as provided in section 192 and other sections of this Code, and when, as provided in section 194 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders

who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association * * *.

* * * The proceeds of the assets, or property of such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

FIRST. To pay the expense of the execution of the trust to the date of such payment.

SECOND. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

THIRD. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent.

STATEMENT

The facts, disclosed by petitioner's allegations and by the opinion of the court below in *Lucking and Davis* v. *United States,* 102 C. Cls. 233,[1] are as follows:

The Detroit Bankers Company, hereafter referred to as the holding company, is an insolvent bank holding company which owned all the capital stock of the First National Bank-Detroit, a national banking association having its principal office and place of business in Detroit, Michigan, and hereafter referred to as the bank (R. 4–5; 102 C. Cls. at 240). The shares of stock of the holding company, issued to former shareholders of the bank in exchange for the bank stock, contained a promise by the holder that he would be liable for his proportionate share of any statutory liability imposed on the holding company as owner of the bank stock (102 C. Cls. at 240). Petitioner is the receiver of the insolvent holding company (R. 4, 35–36).

On May 11, 1933, the Comptroller of the Currency found the bank to be insolvent, and appointed a receiver for it (R. 5). This receivership continued until 1944 when it was terminated and the administration thereof finally closed (R. 5). Subsequent to his appointment, the receiver

[1] The Court of Claims found that most of the facts alleged by petitioner are substantially the same as those recited in its opinion in *Lucking and Davis* v. *United States*, *supra* (R. 54).

of the bank, on the basis of the promise by the shareholders of the holding company to assume their proportionate share of any statutory liability imposed on the holding company, and on the conclusion that the shareholders of the holding company were shareholders in the bank within the meaning and the purpose of the statute making shareholders in national banks liable to assessment, enforced such assessments against the holding company's shareholders (Pet. 9; 102 C. Cls. at 240). Cf. *Anderson* v. *Abbott,* 321 U. S. 349.[2] A total of $25,000,000 was assessed against these stockholders, and a total of approximately $19,000,000 was collected (R. 55).[3] On July 29, 1938, the United States District Court for the Eastern District of Michigan entered an order authorizing the receiver of the bank to compromise and settle various controversies between himself and the then receiver of the holding company (R. 54).[3a] Paragraph 3 of the order provided: "The Receiver of Detroit Bankers Com-

[2] The holding company was hopelessly insolvent after the failure of the banks whose stocks it held (102 C. Cls. at 240) and was dissolved in May 1933. In July 1933, a petition in bankruptcy was filed against it. See *Barbour* v. *Thomas,* 86 F. 2d 510, 514 (C. C. A. 6) certiorari denied, 300 U. S. 670.

[3] Petitioner alleges that these assessments were paid by the closed bank's stockholders (R. 7. See Pet. 16). This allegation incorrectly states the relationship between the shareholders of the holding company and the bank. See 102 C. Cls. at 240–241; *Barbour* v. *Thomas, supra.*

[3a] As shown in the court below, the transfer so ordered was effectuated by stipulation shortly thereafter.

pany is to transfer and deliver unto the Receiver of First National Bank-Detroit the shares of the capital stock of First National Bank-Detroit now held by said Detroit Bankers Company, and said Receiver is to hold said shares of stock as custodian for the shareholders of Detroit Bankers Company."[4] (R. 54). By December, 1942, the last of the bank's physical assets had been sold; all unsecured depositors were paid over 107 cents on the dollar[5] and released and satisfied their claims against the bank (R. 6).

In September 1943, W. A. Lucking, petitioner's attorney herein, on behalf of himself as a depositor and all other general depositors and creditors of the bank "as their interests may appear," and, together with M. H. Davis, as shareholders in the holding company, on behalf of themselves and all others who owned shares in the holding company in 1933, filed suits in the Court of Claims seeking judgments against the United States for $3,500,000 allegedly illegally paid out of the assets of the bank for private attorneys' fees and legal expenses incident to the receivership of the bank (Pet. 8; 102 C. Cls. at 236–237), and for $1,251,000 allegedly illegally paid out of the assets of the bank for salaries of employees in the Insolvent National Bank Division, Washington, D. C., office of the Comptroller of the

[4] See *Lucking* v. *Delano, Comptroller of the Currency*, 129 F. 2d 281 (C. C. A. 6).

[5] See 80th Annual Report of Comptroller of Currency (1942) p. 12.

Currency (Pet. 8; 102 C. Cls. at 237). The principal basis for these claims was that the United States was required to pay these sums out of its own funds, and that no money whatever should have been taken from the bank's assets for these purposes (102 C. Cls. at 237–238).[6] The Government demurred to the two petitions, urging that plaintiffs did not state facts showing that they were entitled to recover, either as individuals or as members of a class of persons having interest similar to their own (102 C. Cls. at 239). The demurrer was sustained and the petitions dismissed (R. 54; Pet. 8). The court held that neither Lucking as a depositor, who had been paid in full (R. 6), nor he and his co-plaintiff Davis as shareholders in the holding company, could maintain class actions to remedy the wrongs alleged; that the claims, if enforceable, belonged to the bank or its receiver; that if a stockholders' suit was necessary, the holding company was the sole stockholder; and that no showing had been made that it or its receiver had refused to sue (R. 54; 102 C. Cls. at 241).

On June 26, 1945, upon the petition of Lucking and Davis, the receivership of the holding company was reopened, and petitioner herein was

[6] The Court of Claims pointed out that it was difficult to understand why the public treasury should bear the expenses of national bank receiverships (102 C. Cls. at 238), a view which is apparently shared by Congress. See note 11, *infra*, p. 13.

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appointed receiver for the purpose of prosecuting the instant action (R. 4–5, 35–36). This suit was filed on December 21, 1945, to compel an accounting and repayment by the United States of the $3,500,000 attorneys' fees and $1,251,000 clerks' salaries allegedly illegally paid out of the bank's assets by the Secretary of the Treasury, the Comptroller of the Currency and the bank's receivers (R. 1–2, 11–12, 15–17). Petitioner alleged the holding company to be the sole owner and holder of the capital stock of the bank (R. 4) and charged, principally "upon information," that these sums were illegally and secretly abstracted from the assets and trust estate of the bank (R.1–2, 11–12, 15–17). Judgment against the United States was sought for both the sums of $3,500,000 and $1,251,000 with interest (R. 32–33). There was also a prayer that the United States account as a trustee for the above sums and that petitioner have inspection and discovery of and from the records of the bank and receivership concerning the matters covered by the petition (R. 32–33).

The United States demurred to the petition (R. 53). In its brief in suport of the demurrer, the Government denied that the holding company was the owner of the capital stock of the bank, and set forth the order of July 29, 1938, of the United States District Court for the Eastern District of Michigan directing the receiver of the holding company to deliver the shares of capital

stock of the bank to the bank's receiver to hold as custodian for the shareholders of the holding company (R. 54). In further support of its demurrer, the Government urged that the action be dismissed on the grounds that, even if petitioner were a stockholder in the bank, he would have no right to sue because neither he, nor any other stockholder as such, could benefit by any recovery in view of Section 3 of the Act of June 30, 1876, as amended, *supra,* pp. 2–3 (R. 55).[7] The Court below sustained the demurrer (R. 55) and entered judgment dismissing the petition (R. 56). It refused to accept petitioner's allegation that his principal, the holding company, was sole owner of the bank's capital stock, stating that the order of the District Court for Eastern Michigan, uncontradicted by petitioner, was a complete divestment of the holding company's interest in the stock of the bank (R. 54–55). Thus it found that the only ground for the maintenance of petitioner's suit was lacking (R. 55). Moreover, the court held that, even if petitioner's principal were a stockholder in the bank, the petition should be dis-

[7] The Government also urged that the petition be dismissed on the additional grounds that petitioner's claim is barred by laches; that a substantial portion of petitioner's claim is barred by the statute of limitations; and that since petitioner alleges an illegal and gross breach of trust (R. 20), the suit is in the nature of a tort action over which the Court of Claims has no jurisdiction. The court below did not consider it necessary to pass upon these however, and held that the first two grounds urged were completely dispositive of this action (R. 55).

missed for it did not appear that the holding company, as a stockholder, would benefit by any recovery (R. 55); that under the provisions of Section 3 of the Act of June 30, 1876, *supra*, pp. 2–3, the bank's stockholders as such could receive a dividend only after the assessments have been repaid; and that, in the instant case, since it did not appear that any part of the $19,000,000 paid in by the assessed shareholders of the holding company had been repaid, petitioner could not benefit by the recovery of the approximately $5,000,000 claimed in this suit (R. 55).

ARGUMENT

The judgment of the court below is clearly correct and no review by this Court is warranted.

1. Since the instant action was brought as a shareholder's suit, petitioner alleged that the holding company, his principal, was the sole owner and holder of the stock of the insolvent bank. The court below held that this allegation of stock ownership in petitioner's principal, necessary to qualify petitioner as plaintiff herein, was completely rebutted by the order of the United States District Court for the Eastern District of Michigan, entered prior to the institution of this suit, which directed the holding company to transfer all shares of bank stock to the receiver of the bank to hold as custodian for the shareholders of the holding company (R. 54–55).[8] Petitioner did not

[8] Petitioner's attorney herein had heretofore unsuccessfully sought to set aside this precise order. *Lucking* v. *Delano, Comptroller of the Currency*, 129 F. 2d 281 (C. C. A. 6); see 102 C. Cls. at 241.

contradict or attempt to explain the order of the district court as being anything but a complete divestment of the holding company of all interest in the stock of the bank (R. 54). Nor is there anything in the record to indicate that petitioner or his principal owned or had any stock interest in the bank upon which the suit could be grounded. In these circumstances, we submit that petitioner is a complete stranger to the action which he attempts to assert and that the court below was clearly correct in entering judgment dismissing the action. It is well settled that a stockholder cannot maintain a stockholders' suit unless he is a stockholder in fact at the time the suit is brought. 13 Fletcher Cyc. Corporations (Perm. Ed. 1943) § 5972.[9]

[9] The present suit is the last to date of an extended litigation unsuccessfully brought by W. A. Lucking, petitioner's counsel, in his long-standing controversy with the receiver of the First National Bank-Detroit and the Comptroller of the Currency. *Lucking* v. *Delano, Comptroller of the Currency*, 117 F. 2d 159 (C. C. A. 6); *Lucking* v. *Delano, Comptroller of the Currency*, 122 F. 2d 21 (App. D. C.); *Lucking* v. *Delano, Comptroller of the Currency*, 129 F. 2d 281 (C. C. A. 6); *Lucking* v. *Delano, Comptroller of the Currency*, 129 F. 2d 283 (C. C. A. 6); *Lucking* v. *Delano, Comptroller of the Currency*, Civil No. 19333 (D. D. C.); *Lucking* v. *Schram, Receiver of the First National Bank-Detroit*, 117 F. 2d 160 (C. C. A. 6); *Lucking et al.* v. *First National Bank-Detroit, et al.*, 142 F. 2d 528 (C. C. A. 6); certiorari denied, 323 U. S. 740; *Lucking and Davis* v. *United States*, 102 C. Cls. 233. In the following suits Lucking either personally intervened, or represented invervenors, or both, against the receiver of the bank: *Barbour* v. *Thomas*, 86 F. 2d 510 (C. C. A. 6), certiorari denied, 300 U. S. 670; *Ullrich* v. *Thomas*, 86 F. 2d 678 (C. C. A. 6), certiorari denied, 301 U. S. 692.

In addition, as the Court of Claims held, even if it be assumed that the petitioner and his principal were still shareholders in the bank, as was alleged, the petition must be dismissed for the reason that the holding company could not possibly benefit by any recovery. Under the National Bank Act (Sec. 3 of the Act of June 30, 1876, *supra,* p 3) these assessments would have to be repaid before any distribution could be made to shareholders as such. The holding company had never repaid any portion of the $19,000,000 collected on the stock assessments; it was obvious, therefore, as the court held, that the $5,000,000 sought by the petitioner could not possibly benefit him or his holding company. (R. 55.) The Court of Claims, we submit, was clearly right on this ground alone in dismissing the petition.

2. Moreover, even if petitioner had standing to maintain a stockholders' suit, we submit that he has here failed to state a cause of action. Petitioner asserts that the sums of $3,500,000 for private attorneys' fees and $1,251,000 for clerks' salaries were illegally taken from the assets of the bank (R. 2); and that these expenditures "upon information," were grossly excessive (R. 13, 23)[10]

[10] The First National Bank-Detroit is the largest national bank ever to be placed in receivership. 78th Annual Report of the Comptroller of the Currency (1940) pp. 39–40. The gross expenditure here complained of was for legal services and other expenses incident to the receivership which extended over a period of some ten years. The expenses of which petitioner complains are part of the

and were an illegal and gross breach of trust (R 2, 20). It is obvious that these allegations "upon information" are pure guess work and the suit a "fishing expedition." See *Lucking* v. *Delano,* 122 F. 2d 21, 26 (App. D. C.).

The expenditures for attorneys' fees and clerical salaries for which petitioner seeks recovery were satisfied out of the assets of the bank pursuant to R. S. 5238, *supra,* p. 2, which provides that all expenses of any receivership shall be paid out of the assets of the insolvent bank before distribution of the proceeds of the liquidation. The Comptroller of the Currency has consistently employed private counsel to conduct litigation and perform legal services in connection with the receivership of national banks, and their fees have been paid out of the assets of the closed bank. These facts have been regularly reported to Congress, which has often amended the National Bank

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total costs of liquidation. On December 31, 1944, total costs of liquidation amounted to $24,877,957 including expenses incurred by the conservator (82nd Annual Report of the Comptroller of the Currency (1944) p. 168). This is 5.2 percent of the total collections of $474,346,503 (*id.*, p. 167). This compares favorably with the record of the 2,807 national bank receiverships from 1865 to December 31, 1944, in which the total liquidation costs averaged 6.6 percent of total collections (*id.*, pp. 158–159). The cost to the receiver of the bank in simply defending his administration of the receivership from the "persistent, harassing, and futile litigation" initiated or otherwise pressed by Lucking was necessarily a substantial one. *E. g. Cleveland* v. *Second National Bank & Trust Co.,* 149 F. 2d 466, 469 (C. C. A. 6), certiorari denied, 326 U. S. 775.

Act without in any way infringing on this authority exercised by the Comptroller.[11] We believe that this construction by the Comptroller of his authority under R. S. 5238 is controlling (*United States* v. *Hill,* 120 U. S. 169, 180) and submit that there is no merit to petitioner's contention that these expenditures were improperly incurred. Similarly, we submit that the expenditures out of the closed bank's assets for salaries in the Insolvent National Bank Division of the Comptroller's Washington, D. C. Office were proper, and that petitioner's claim in this respect is equally without merit.

3. For the purpose of discussing petitioner's lack of standing to maintain a stockholders' suit and the merits of the asserted claim herein, we have assumed that the court below had jurisdiction to entertain this action. Actually, however, the Court of Claims possesses no such jurisdiction. Essentially, the present proceeding is an attempt to collect damages from the United States on the ground of an alleged violation of duty by officers of the United States, viz., the Secretary of the Treasury and the Comptroller of the Cur-

[11] See Annual Reports of the Comptroller of the Currency: (1935) at pp. 11, 32, 34, 177; (1936) at pp. 9, 27, 30; (1937) at pp. 14, 46, 208; (1938) at pp. 25, 197; (1939) at pp. 49, 53–54; (1940) at p. 47; (1941) at p. 38; (1942) at p. 12; (1943) at p. 13; (1944) at p. 15; (1945) at p. 16. So far as is known, Congress has never appropriated funds to defray the legal expenses of national bank receiverships.

rency, in making the challenged expenditures from the assets of the bank. The expenditures are characterized in the complaint as "illegal and a gross breach of trust and in direct defiance and disregard and breach of the Acts of Congress in such case made and provided" (R. 20, 2). Clearly, this is an action in tort beyond the jurisdiction of the Court of Claims. Section 145 of the Judicial Code, 28 U. S. C. 250; *Schillinger* v. *United States,* 155 U. S. 163; *Gibbons* v. *United States,* 8 Wall. 269; *Langford* v. *United States,* 101 U. S. 341; *United States* v. *Nederlandsch,* 254 U. S. 148.[12]

CONCLUSION

The judgment of the court below was clearly correct, and there is no conflict. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] The Federal Tort Claims Act of August 2, 1946 (Pub. Law 601, 79th Cong., 2d Sess.) would have no relevance here under any theory since the asserted claims accrued prior to January 1, 1945. Section 403 (a).

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